NO. 80-850

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

Appellant,

v.

BOBBY H. HELMS,

Appellee.

Appeal From The United States Court Of Appeals For The Fifth Circuit

APPELLANT'S REPLY BRIEF

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BOBBY H. HELMS,

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Appeal From The United States Court Of Appeals For The Fifth Circuit

APPELLANT'S REPLY BRIEF

This brief is presented for the purpose of addressing certain points in Appellee's brief and insuring that the framework within which this case is presented to the Court is as objective as possible.

I. THE CHALLENGED STATUTE IS NOT OVERLY BROAD.

A. The Statute Will Not Necessarily Affect Parents Who Briefly Sojourn Across State Lines.

In his brief, Appellee complains that Ga. Code § 74-9902(a) is overly broad because

"[i]t can reach and brand as the distinguishing elc-

> ment of a felony a parent's most innocent and innocuous travel from the state. By its terms, a parent who strolls from Columbus, Georgia, to Phoenix City, Alabama, and back again that evening may have inadvertently opened himself up to a special felony conviction if he has not been adequately supporting his children or to special jeopardy of it if there could be any suggestions of it." Brief for Appellee, p. 8.[1]

This statement is most misleading. In the first place, the Georgia Supreme Court has never interpreted the statute to apply to brief sojourners from the State.[2] Thus, if the Georgia Supreme Court were faced with a case of a parent who had briefly strolled across state lines, or one who, like the Delta Airlines pilot [Brief for Appellee, p. 8], had left the State briefly on work, but returned, there is no reason to assume it would rule that such parents were encompassed within the intent of Ga. Code § 74-9902(a).

Indeed, there is no reason to assume that the Georgia Supreme Court would do other than this Court did in *Mortensen v. United States*, 322 U.S. 369 (1944) when faced with a challenge to a conviction based on an extremely literal interpretation of the Mann Act. In *Mortensen*, the lower courts had upheld a conviction of a couple who took two prostitutes on a brief vacation from Nebraska to Utah and back again. Strictly speaking, the couple, who ran the house of prostitution, knew that after the return trip, the girls would again be engaged in immoral activities. However, in reversing the convictions,

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[1] Since Appellant has not yet received a copy of Appellee's brief in printed form, all page references herein will be to the typed version.

[2] In the only case in which the Georgia Supreme Court considered the felony/misdemeanor distinction in Ga. Code § 74-9902(a), the defendant had been out of Georgia for over 5 months before he was indicted for abandoning his children and leaving the State. *See, Garren v. The State*, 245 Ga. 323 (1980); Brief for Appellant, p. 22, n.14.

this Court noted that

> "[t]o accomplish its purpose the statute enumerates the prohibited acts in broad language capable of application beyond that intended by the legislative framers. . . . [W]e perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or for any other innocent purpose." *Mortensen v. United States, supra,* at 377.

Without intimating an opinion as to whether the Georgia Supreme Court should, or would, so interpret Ga. Code § 74-9902(a), Appellant merely points out that since the statute *could* be so narrowed by the State's highest appellate court, it is misleading and premature for Appellee to suggest that parents on brief sojourns out of state would necessarily be considered felons under the statute.

Therefore, this Court should decline to pass on a constitutional challenge to a statute that is "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' " *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) (*Bellotti* I), quoting *Harrison v. NAACP,* 360 U.S. 167, 177 (1959).

More importantly, however, there is absolutely no evidence in the record that Appellee himself was on a brief, out-of-state sojourn. On the contrary, the record indicates that Appellee left Georgia in the summer of 1975 and did not return until February, 1976, and then only for a visit to his child. [A.16-17] This is an absence for approximately six or seven months, hardly a brief sojourn. Then, after being arrested and pleading guilty to child abandonment, the Appellee again left Georgia in March

or April of 1976 and remained absent for several more months. [A.17-18] Therefore, contrary to the suggestion of Appellee, this Court is not presented with the situation where a parent who briefly sojourns outside the State is wrongfully convicted of a felony offense. Thus, Appellee lacks the personal stake in the controversy needed to confer standing to advance the overbreadth argument in this regard. *H.L. v. Matheson*, ____ U.S. ____, 49 L.W. 4255, 4257 (March 23, 1981).

Nor is this a case where a facial attack should be permitted and sustained on the ground that an average person reading the statute might be discouraged from undertaking innocent interstate travel. The possibility of such discouragement, although conceivable, is so slight that it ought to be considered *de minimis*.

B. The Validity Of The Second Prong Of The Statute Is Not Before The Court.

For the first time, Appellee asserts that the challenged statute is overly broad because

> "since the statute itself contemplates that charges can arise after a parent has left the state and established residency elsewhere, its impact cannot even be limited to a discrete class of parents who cross the state line while 'accused' of child abandonment." Brief for Appellee, at p. 8.

Although Appellant has explained the existence of the second prong of the statute, it has never been thought to be a matter of controversy before the Court. *See*, Brief for Appellant, pp. 12, 29. By his reference to the part of the statute which provides that a person who abandons his child after leaving the State, Appellee apparently is attempting to "maintain that the statute is overbroad and purports to reach protected, as well as unprotected

conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Appellant does not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the Nation's laws." *Broadrick v. Oklahoma, supra*, at 610-611 [citations omitted].

Of course, Appellant understands that this Court has made a limited exception to this standing rule in certain cases arising under the First Amendment. *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1971). However, no claim based on the First Amendment has been, or could be, raised by Appellee. Therefore, "Appellee's standing to contest the validity of the statute as applied to him must be considered on the basis of the facts as stipulated" before the lower court. *Zablocki v. Redhail*, 434 U.S. 374, 409 (1978) (Rehnquist, J., dissenting).

Appellee has stipulated that he pleaded guilty to the felony of first abandoning his child and then leaving the State. [A.17]. Therefore, he has no standing to challenge the second prong of the statute which only applies when a person leaves the State first and does not abandon his child until later.

C. The Challenged Statute Does Not Encompass Parents Who Are Unable To Pay.

The Court of Appeals has indicated that

> "Under [Ga. Code § 74-9902(a)] a person leaving the State fully intending to support his or her children, *but unable to do so,* commits a felony." [A.34-35] [Bracketed matter and emphasis supplied.]

This is clearly erroneous. In order to be a crime under Georgia law, the abandonment of a child by the father or mother must be "wilful and voluntary." Ga. Code § 74-9902(a); *Waites v. State,* 138 Ga. App. 513, 514 (1976); Brief for Appellant, p. 26, n.21. It is a defense to such a charge to say that a person was not wilfully *refusing* to fulfill his support obligations, but simply that, due to bad fortune, he was *unable* to make any payments. *Elam v. The State,* 138 Ga. App. 432 (1976); *Moody v. The State,* 141 Ga. App. 294 (1977). *See also, Padova v. The State,* 151 Ga. App. 167 (1979). This rule is consistent with Georgia's approach to support obligations in regular civil custody disputes. *See, e.g., Brown v. Brown,* 237 Ga. 122 (1976).

Appellee has never alleged, and there is no evidence in the record to indicate, that he was, for any reason, unable to make child support payments. Thus, this Court should correct the Court of Appeals which erroneously indicated that Ga. Code § 74-9902(a) is overly broad in that it reaches the truly misfortunate parents who, through no fault of their own, are honestly unable to properly support their children.

D. The Statute Is Not Defective Because Of A Lack Of Specific Intent.

Both the Appellee and the Court of Appeals found the

absence of specific intent in Ga. Code § 74-9902(a) to be indicative of its overbreadth. Brief for Appellee at p. 8; A.34-35. Appellant acknowledges that the challenged statute does not require a specific intent to avoid either prosecution or child support obligations, but submits that no such specific intent is required.

Although "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v. Texas*, 392 U.S. 514, 535 (1968), it has noted that "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

> "[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." W. LaFave & Scott, Criminal Law 196 (1972).

"Generally this limited distinction between knowledge and purpose has not been considered important since 'there is a good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.' LaFave & Scott, *supra*, at 197. In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment." *United States v. United States Gypsum Co.*, *supra*, at 445 [citations omitted].

In order to be guilty of a felony under Ga. Code § 74-

9902(a), one must have the general [3] criminal intent to wilfully and voluntarily abandon one's child and leave it in a dependent condition. The fact that one does not have to have any "evil design" when he crosses the State line does not make the statute defective.[4] A lack of specific purpose in the challenged statute is in keeping with conclusions drawn by certain commentators from the historical developments of the mental requisites of crime:

> "The conception of *mens rea* has varied with the changing underlying conceptions and objectives of criminal justice. At the beginning when the objective of criminal administration was to restrict and supplant the blood feud, the mental factor was of importance insofar as it determined the provocative nature of the offense. . . .
>
> * * *
>
> "Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests." Sayre, Mens Rea, 45 Harv.L.Rev. 974, 1016-1017 (1932) (footnotes omitted).

This is not to say, of course, that Ga. Code § 74-9902 is a strict liability crime which dispenses altogether with

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[3] Appellant wishes to correct the assertion on p. 26 of its main brief, both in the text and at n.21, that a specific criminal intent must be found before one may be convicted under Ga. Code § 74-9902.

[4] An example of another statute which does not require intent of any kind for one of its elements is statutory rape. *See*, Ga. Code § 26-2018. In Georgia, lack of specific purpose or even general knowledge of the victim's age is irrelevant. *Drake v. The State*, 239 Ga. 232, 233 (1977).

criminal intent, *see, Morissette v. United States*, 342 U.S. 246, 262, n.20 (1952), but rather that it is a hybrid statute which requires intent for some, but not all, of its elements. Differing rules of criminal responsibility for differing circumstances

> "have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas, supra*, at 536.

Just as this Court in *Michael M. v. Superior Court of Sonoma County*, ____ U.S. ____, 49 L.W. 4273 (March 23, 1981), has recognized the important and substantial state interest in preventing teenage pregnancies which underlies statutory rape laws, so too should it recognize the compelling interests in preventing child abandonment by people beyond the State's jurisdiction, which validates Ga. Code § 74-9902(a), notwithstanding its lack of a specific intent attached to the crossing of state lines.

II. THE CHALLENGED STATUTE IS NOT UNIQUE.

Appellee notes that "[o]nly a few other states comparably classify child abandonment according to travel or residency outside of their jurisdictions." Brief for Appellee at p.5, n.4. And in its discussions of other state statutes, the Court of Appeals also seems to imply that Georgia's statute is uniquely overbroad. [A.35, n.10] Appellant believes that such criticism is misplaced.

Although no other states have child abandonment statutes exactly the same as Georgia's (see Brief for Appellant at 16-17), several states do share the same approach to the problem of parents who abandon their children and

absent themselves from the State.[5] For example, in Texas, criminal nonsupport is a Class A misdemeanor in ordinary circumstances, but a felony in the third degree if the actor "commits the offense while residing in another state." Tex. Penal Code Ann. § 25.05 (1974). The practice commentary on this criminal nonsupport section indicates that "the felony grade for the offense of nonsupport by a spouse who is out of state facilitates extradition and continues prior law." *Id.* Utah's criminal nonsupport statute is identical to that of Texas. *See,* Utah Code Ann. § 76-7-201 (1968).

In Tennessee, any person who wilfully leaves the state, after abandoning his child with intent to leave it destitute, is guilty of a felony, Tenn. Code Ann. § 39-217 (1975) whereas a person who so abandons his child without leaving the state is guilty of a misdemeanor. Tenn. Code Ann. § 39-202 (1975). Further, it is a felony for a person under a court order of support to leave the state without complying with the order or, while absent from the state, to fail to comply with the order. Tenn. Code Ann. § 39-219 (1975). No similar crime appears to be levied on those who fail to comply with court orders while within the State.

Thus, Georgia is not alone in seeking to vindicate her interests in protecting her children and enforcing her criminal laws by enacting a statute which provides that a person who commits the crime of child abandonment and leaves the State is guilty of a felony, whereas a per-

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[5] Several other states make it a felony for parents to leave the state with the intent to avoid their duty of support, whereas it is only a misdemeanor for those who remain in the state. *See, e.g.,* Ark.Stat. Ann. § 41-2407 (1947); Mo.Stat.Ann. § 568.04 (Vernon, 1949) (Criminal nonsupport); Okla.Stat.Ann.Ch. 31 § 852 (West, 1951).

son who commits the crime of child abandonment without leaving the State is only guilty of a misdemeanor.

Nor is the challenged statute the only provision in Georgia law to make such a felony/misdemeanor distinction. Thus, Georgia stands in contrast to Arkansas, where the official statutory commentators noted that "[t]he difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception." *See*, Ark. Rev.Stat.Ann. § 41-2405 (1975) as discussed by the Court of Appeals, A.35, n.10. Under Ga. Code § 74-9903, it is a felony for a husband to abandon his pregnant wife and leave the State, whereas it is only a misdemeanor if he remains within the State. Similarly, it is a felony to interfere with the custody of a child and to take the child out of the State, but interference with the custody of a child within the State is only a misdemeanor. Ga. Code § 26-1312. Thus, it can be seen that Georgia is consistent in its design to protect and insure adequate support for the most helpless members of its society.

CONCLUSION

For the reasons stated in the Brief of Appellant and herein, we urge the Court to reverse the judgment of the Court of Appeals.

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CERTIFICATE OF SERVICE

I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Appellant's Reply Brief, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

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This ____ day of April, 1981.